89-501

No.

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORTHWESTERN INDIANA TELEPHONE CO., INC.
and NORTHWEST INDIANA CATV, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RUSSELL D. LUKAS
Counsel of Record
GEORGE L. LYON, JR.
KIRBY H. PORTER
LEE BURDICK
LUKAS, MCGOWAN, NACE & GUTIERREZ, CHARTERED
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006
(202) 857-3500
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Is an agency rule, which directly implicates First Amendment values, unconstitutionally overboard on its face, when it employs a definition of a particular term which is admittedly more restrictive than the definition of that very term contained in the agency's enabling statute?

2. May a Court of Appeals avoid the merits of facial constitutional and statutory challenges to an agency rule, thus depriving a litigant of First Amendment rights, by strictly employing principles of issue preclusion that were nowhere asserted, and thereby waived, by the agency itself?

3. May the Federal Communications Commission, which has jurisdiction only over interstate communications services, interpret its rules to require a telephone company to obtain prior certification to construct facilities to be owned and operated by a cable company, when the telephone company is statutorily exempt from that certification requirement and provides no communications services over the facilities it constructs?

PARTIES BELOW

The following were parties or intervenors in the proceeding in the United States Court of Appeals for the District of Columbia Circuit, the court whose judgment is sought to be reviewed: Northwestern Indiana Telephone Co., Inc., Northwest Indiana CATV, Inc., Federal Communications Commission, United States of America, United States Telephone Association, Bell Atlantic Corporation, US Cable of Northern Indiana, and National Cable Television Association, Inc.*

---

* Pursuant to S. Ct. R. 28.1, Northwestern Indiana Telephone Co., Inc. and Northwest Indiana CATV, Inc. state that they do not have any affiliates or subsidiaries other than those which may be wholly owned.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATUTORY PROVISIONS INVOLVED	2
ADMINISTRATIVE REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Preliminary Statement	2
II. Statement Of Facts	4
A. The Parties	4
B. The FCC Proceeding	6
C. The *NITCO I* Remand	9
D. The Post-Remand Proceedings	10
E. The Qualifications Hearing	12
F. The Decision Below	13
REASONS FOR GRANTING THE WRIT	16
I. The FCC's Cross-Ownership Rules Are Unconstitutional On Their Face	17
A. The FCC Had To Apply The Cable Act	17
B. The FCC's Rule Is More Restrictive Than The Cable Act	18
II. The D.C. Circuit Refused To Consider Fundamental Issues That Were Properly Presented	20

TABLE OF CONTENTS—Continued

	Page
A. The Waiver Issue	21
B. The Exhaustion Doctrine	23
C. The Law Of The Case Doctrine	26
III. The Court Neglected To Rule On The Jurisdictional Issue	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Action for Childrens Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977)	23
Alaska Chapter, Assoc. Gen. Contractors of America, Inc. v. Pierce, 694 F.2d 1162 (9th Cir. 1982)	24
Allen v. State Bd. of Elections, 393 U.S. 544 (1969)	23
Amen v. City of Dearborn, 718 F.2d 789 (6th Cir.), *cert. denied*, 465 U.S. 1101 (1983)	26
American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987)	*passim*
American Tel. & Tel. Co. v. FCC, 551 F.2d 1287 (D.C. Cir. 1977)	23
Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984)	25
Arizona v. California, 460 U.S. 605 (1983)	26
Boos v. Barry, —— U.S. ——, 108 S. Ct. 1157 (1988)	19
Bouchet v. National Urban League, Inc., 730 F.2d 799 (D.C. Cir. 1984)	27
Buckley v. Valeo, 424 U.S. 1 (1976)	3
Burlington Truck Lines v. United States, 371 U.S. 156 (1962)	20
Carafas v. La Vallee, 391 U.S. 234 (1968)	23
Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987)	18
Chapman v. National Aeronautics & Space Adm., 736 F.2d 238 (5th Cir.), *cert. denied*, 469 U.S. 1038 (1984)	27
City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153 (D.C. Cir. 1987)	24
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986)	*passim*
Complaint of Bankers Trust Co., 752 F.2d 874 (3d Cir. 1984)	24
Computer and Communications Ind. Assoc. v. FCC, 693 F.2d 198 (D.C. Cir. 1982)	29
Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967)	21, 22
Dick Warner Cargo Handling v. Aetna Business Credit, 746 F.2d 126 (2d Cir. 1984)	26

TABLE OF AUTHORITIES—Continued

	Page
Doe v. Anrig, 728 F.2d 30 (1st Cir. 1984)	26
Eastern Carolinas Broadcasting Co. v. FCC, 762 F.2d 95 (D.C. Cir. 1985)	25, 28
Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330 (5th Cir. 1972)	24
Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084 (3d Cir. 1988)	21
FPC v. Texaco, Inc., 417 U.S. 380 (1974)	20
General Tel. Co. v. FCC, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)	28
Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969)	23
Green v. Brown, 398 F.2d 1006 (2d Cir. 1968)	24
Hormel v. Helvering, 312 U.S. 552 (1941)	24
Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968)	24
Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984)	14, 21
Lilly v. Grand Trunk W.R. Co., 317 U.S. 481 (1943)	23
Llerandi v. FCC, 863 F.2d 79 (D.C. Cir. 1988)	8
Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986)	*passim*
McKart v. United States, 395 U.S. 185 (1969)	23, 26
Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987)	*passim*
Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979)	3
Mussman v. FCC, No. H88-0163 (N.D. Ind. Mar. 24, 1988)	11
National Advertising Co. v. Rolling Meadows, 789 F.2d 571 (7th Cir. 1986)	24
National Assoc. of Reg. Utility Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976)	29
National Student Assoc. v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969)	24
New York State Broadcasters Assoc. v. United States, 414 F.2d 990 (2d Cir. 1969)	23
News America Pub., Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988)	16

TABLE OF AUTHORITIES—Continued

	Page
Office of Communication of United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972)	24
Pegues v. Morehouse Parish School Bd., 706 F.2d 735 (5th Cir. 1983)	27
Quern v. Jordan, 440 U.S. 332 (1979)	26
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986)	*passim*
SEC v. Chenery Corp., 332 U.S. 194 (1947)	20
Smith v. Pasqualetto, 246 F.2d 765 (1st Cir. 1957)	24
Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985)	3, 22
Thomas v. Collins, 323 U.S. 516 (1945)	16
Ulster County Court v. Allen, 442 U.S. 140 (1979)	22
United States v. Carolene Products Co., 304 U.S. 144 (1938)	16
United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499 (1935)	20
United States v. Curtis, 683 F.2d 769 (3d Cir.), *cert. denied*, 459 U.S. 1018 (1982)	28
United States v. Northwestern Ind. Tel. Co., Inc., No. H87-0158 (N.D. Ind. Mar. 11, 1987)	13
United States v. O'Brien, 391 U.S. 367 (1968)	18
Weinberger v. Salfi, 422 U.S. 749 (1975)	25
Wolff v. Selective Service Local Bd., 372 F.2d 817 (2d Cir. 1967)	24

Administrative Decisions

Alabama Radio Corp., 69 F.C.C.2d 1256 (1978)	8
California Water and Tel. Co., 64 F.C.C.2d 753 (1977)	5, 29
Chesapeake & Potomac Tel. Co., 57 Rad. Reg. 2d (P&F) 1003 (1985)	9
Rhys G. Mussman, 3 FCC Rcd 6808 (Com. Car. Bur. 1988)	13
Section 2(b)(2) Ruling, 2 FCC Rcd 1750 (1987)	30
Section 214 Certificates, 21 F.C.C.2d 307 (1970), *recon. in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971)	3

TABLE OF AUTHORITIES—Continued

Page

Telephone Company/Cable Television Cross-Ownership Rules (Notice of Inquiry), 2 FCC Rcd 5092 (1987) 10, 19
Telephone Company/Cable Television Cross-Ownership Rules (Further Notice of Inquiry), 3 FCC Rcd 5849 (1988) ..... *passim*
Virginia Communications, Inc., 2 FCC Rcd 1895 (1987) 8

Constitution Provision

U.S. Const., amend. 1 ..... *passim*

Statutes and Administrative Regulations

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2350 1
47 U.S.C. § 151 17
47 U.S.C. § 152(b)(2) ..... *passim*
47 U.S.C. § 153(u) 5
47 U.S.C. § 214(a) ..... *passim*
47 U.S.C. § 405 ..... 15, 24
47 U.S.C. § 415(f) 13
47 U.S.C. § 504(a) 13
47 U.S.C. § 522(1) ..... *passim*
47 U.S.C. § 533(b) ..... *passim*
47 C.F.R. § 63.54 ..... *passim*

Miscellaneous

C. Koch, *Administrative Law and Practice* § 10.24 (1985) 25
B. Schwartz, *Administrative Law* § 8.31 (2d ed. 1984) 24
Vestal, *Law of the Case: Single Suit Preclusion*, 1967 Utah L. Rev. 1 ..... 26, 28
C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4478 (1981) 27

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners request this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") refusing to rule on constitutional and statutory challenges to the telephone company/cable television cross-ownership regulations of the Federal Communications Commission ("FCC").

OPINIONS BELOW

The opinion of the D.C. Circuit denying review, reported at 872 F.2d 465, is reprinted in the Appendix hereto at A 1.[1] The prior opinions of the FCC and the D.C. Circuit in this case are reported at 100 F.C.C.2d 1245 (A 103), *recon. denied*, 103 F.C.C.2d 600 (A 78), *conditional stay granted*, 104 F.C.C.2d 451 (A 48), *remanded*, 824 F.2d 1205 (A 32), *reaff'd on remand*, 3 FCC Rcd 3096 (A 18).[2]

JURISDICTION

The judgment of the D.C. Circuit was entered on April 11, 1989. (A 16.) The petition for rehearing with suggestion for rehearing en banc was denied on June 27, 1989. (A 14.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2350.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

---

[1] Citations to the separately paginated Appendix will be styled "A—." "JA—" will refer to the Joint Appendix filed with the D.C. Circuit below.

[2] The two decisions of the D.C. Circuit below will be cited as *NITCO I* and *NITCO II*.

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions herein are Sections 2(b)(2) and 214(a) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §§ 152(b)(2) and 214(a), and Sections 602(1) and 613(b) of the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. §§ 522(1) and 533(b). The text of these provisions are set forth fully at A 128.

ADMINISTRATIVE REGULATIONS INVOLVED

The principal regulation involved herein is Section 63.54 of the FCC's Rules and Regulations, 47 C.F.R. § 63.54, and Note 1 thereto, which provide as follows:

> (a) No telephone common carrier, subject in whole or in part to the Communications Act of 1934, shall engage in the provision of video programming to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier.
>
> (b) No telephone common carrier, subject in whole or in part to the Communications Act of 1934, shall provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such telephone common carrier, where such facilities or arrangements are to be used for, or in connection with, the provision of video programming to the viewing public in the telephone service area of the telephone common carrier.
>
> NOTE 1: (a) As used above, the terms "control" and "affiliate" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship.

* * * *

STATEMENT OF THE CASE

I. Preliminary Statement

This case arose from the FCC's enforcement of its telephone/cable cross-ownership rules to sanction a local

telephone company, whose operations are statutorily exempt from the FCC's authority, and to silence a local cable operator, whose operations are protected by the First Amendment.[3]

The FCC's cross-ownership rules prohibit a telephone company and its affiliates from providing cable television service in the telephone company's service area. The rules violate the First Amendment because their express purpose is to foreclose cable television speech by one group—the telephone companies and those associated with them—in order to promote the speech of others.[4] As this Court has held, such a scheme is "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

---

[3] It is, of course, well established that the cable television business, just like the newspaper or broadcast television business, is a form of speech protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1444 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336 (D.C. Cir. 1985); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

[4] In promulgating its rules, the FCC announced that it believed that protection for the cable industry was necessary because telephone companies would have an "unfair" advantage over non-affiliated or "independent' cable operators who would have to rent space from the telephone companies to string their cables or use cables owned by the telephone companies. *Section 214 Certificates*, 21 F.C.C.2d 307, 323 (1970), *recon. in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). The FCC was worried that, without a cross-ownership restriction, an "undesirable concentration of control of communications media" might develop. *Section 214 Certificates*, 21 F.C.C.2d at 328. The FCC therefore sought to prevent such concentration by forbidding telephone companies from engaging in cablespeech in their service areas. *Id.* The FCC's rules therefore represent a naked effort to protect one group of speakers, *i.e.*, "independent" cable companies, from economic competition by forbidding their competitors, *i.e.*, telephone companies, from engaging in protected speech.

The FCC has now admitted in a parallel proceeding not only that cross-ownership restrictions are no longer necessary, but that its rules are more restrictive of First Amendment rights than the superseding cross-ownership provisions of its own enabling statute.[5] Yet, the agency continues to enforce its suspect regulations in this case, repeatedly ignoring constitutional and statutory challenges to its admittedly overinclusive rules.

Over the past two years, facial challenges to the cross-ownership rules were brought three times to the FCC, and twice to the D.C. Circuit. Yet, there has never been a ruling on the overbreadth of those regulations. Thus, this case not only presents facial challenges to the FCC's rules, but it involves fundamentally important questions concerning the supervisory role of the courts over the quasi-judicial agency actions which suppress free speech. Foremost among those questions is whether a court may strictly apply doctrines of issue preclusion to deprive a litigant of a constitutional defense based on intervening changes in governing law, when the facts suggest that federal officers delayed applying the new law to deny the litigant that defense in an agency enforcement action.

II. Statement of Facts

A. The Parties

Northwestern Indiana Telephone Co., Inc. ("NITCO") is an Indiana corporation that provides telephone service in five small communities south of Gary. NITCO is owned by Robert and Gerald Mussman and has been in the Mussman family since 1932. (JA 38, 1759.)

NITCO is an intrastate carrier; its telephone lines are entirely within Indiana. NITCO provides interstate or foreign communications solely through a physical interconnection with the facilities of Indiana Bell and, ultimately, AT&T. NITCO has no affiliation whatsover with

---

[5] *See Telephone Company/Cable Television Cross-Ownership Rules (Further Notice of Inquiry)*, 3 FCC Rcd 5849, 5865-66 (1988).

either Indiana Bell or AT&T. Thus, as the FCC conceded, NITCO is a "connecting carrier" as defined by Section 3(u) of the Act, 47 U.S.C. § 153(u). (JA 216.)

As a connecting carrier, NITCO is exempt generally from the FCC's authority under the express jurisdictional limitation of Section 2(b)(2) of the Act, 47 U.S.C. § 152(b)(2). *See generally Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 371-76 (1986). In particular, NITCO was statutorily exempt from the requirement of Section 214(a) of the Act, 47 U.S.C. § 214(a), that a carrier obtain a certificate from the FCC before constructing part of an interstate line.

Northwest Indiana CATV, Inc. ("Cablevision") is an Indiana corporation wholly owned and controlled by Robert Mussman's son, Rhys Mussman. (JA 129, 278, 726-27, 736, 1759.) Until the FCC forced it to divest its facilities[6], Cablevision provided cable television service both inside and outside NITCO's service area. (JA 1472.)

None of Cablevision's facilities were owned, operated or controlled by NITCO, and the cable systems were not physically interconnected with NITCO's facilities. (JA 94, 1545.) NITCO provided no communications services to Cablevision that involved the transmission of cable signals.

Cablevision leased space on NITCO's telephone poles for the cable distribution lines. (JA 316-49.) NITCO construction crews physically strung the cable to the poles, and otherwise installed the cable systems, under contract with Cablevision. (JA 94-95, 135-37, 281-83, 297-310, 1549-52.) Such pole attachment activities do not constitute interstate communication by wire or radio, and are not subject to the FCC's jurisdiction. *California Water and Tel. Co.*, 64 F.C.C.2d 753, 758-60 (1977).

---

[6] Cablevision sold its cable systems to its local competitor on July 1, 1989. (A 149.) Thus, the FCC's enforcement of its rules, which were intended to promote competition, ended competition in this case.

B. The FCC Proceeding

In 1983, Comark Cable Fund III of Florida ("Comark") filed a complaint with the FCC, alleging that NITCO and Cablevision engaged in unfair competition.[7] Comark specifically sought the issuance of a cease and desist order. (JA 1.)

Although it is undisputed that there was no common ownership or control of NITCO and Cablevision, Comark argued that they were "affiliated" within the meaning of the FCC's cross-ownership rules. Comark relied on Note 1 to those rules which, as the D.C. Circuit in *NITCO I* subsequently recognized, "define[s] 'affiliate' in sweeping terms" (A 37):

> [T]he terms "control" and "affiliate" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship.

The FCC never issued the requested show cause order, nor did it ever afford petitioners an evidentiary hearing. Rather, after formal answers were filed denying the allegations (JA 88, 129), the FCC's Common Carrier Bureau ("Bureau") instituted an ad hoc procedure in April 1984, in which petitioners were directed to respond to Bureau interrogatories. (JA 260, 271.)

Three months after the FCC's record closed[8], Congress enacted the Cable Act, which took effect December 29, 1984. Section 613(b) of the Cable Act, 47 U.S.C. § 533 (b), contained cross-ownership restrictions which were similar to the FCC's rules. However, under Section

---

[7] Comark's unfair competition claim was never pressed to conclusion, for two reasons: Comark dropped its claims in November 1985 as part of a settlement with NITCO (JA 1865-70); and the FCC expressly declined to rule on Comark's central claim. (A 122.)

[8] Petitioners responded to the Bureau's interrogatories in May 1984. (JA 274, 724.) Those responses generated the filing of pleadings through July 31, 1984, when the administrative record closed. (JA 1313-1431.)

602 of the Cable Act, an "affiliate" is specifically defined as "another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person." 47 U.S.C. § 522(1).

The FCC acted on Comark's complaint on March 12, 1985, after the Cable Act became effective, but before the agency adopted rules implementing the statute. Nevertheless, the FCC decided the case under its Note 1. The agency cited, but did not apply, the governing provisions of the Cable Act. (A 104-5, 124.)

The FCC ruled that petitioners were "affiliated companies" under Note 1, because the agency found that there were "prohibited relationships" between the two corporations. (A 119.)[9] The FCC made that finding by

---

[9] In a subsequent order, the FCC relied on seven "relationships", each of which was "prohibited". (A 80-81.) Those relationships, the existence of which were largely uncontested, were the following:

(1) Robert and Myrtis Mussman personally guaranteed bank loans to their son's cable company;

(2) Robert Mussman personally guaranteed his son's obligations under an indemnity agreement arising from cable franchise litigation;

(3) NITCO employed Rhys Mussman as a non-managerial consultant;

(4) Robert Mussman personally leased office space to Cablevision;

(5) NITCO subleased property owned by Robert Mussman to Cablevision as the site of the headend for one of Cablevision's systems;

(6) NITCO entered into agreements to construct and maintain the cable systems; and

(7) NITCO leased pole attachments and conduit space to Cablevision.

The FCC's findings remained in flux throughout the case. Initially, the FCC purported to make findings based on uncontested facts. (A 59.) By the end of the case, the FCC resorted to making findings on facts disputed by petitioners. (A 23-24.) It did so without resolving the factual disputes in an evidentiary hearing.

attributing the personal relationships between the Mussman family to their separately owned corporations.[10]

Having imputed an "affiliation" between petitioners, the FCC ruled that NITCO had violated Section 214(a) of the Act by constructing cable facilities for its "affiliate" without FCC certification. (A 121.) It therefore ordered NITCO to terminate any prohibited affiliation with Cablevision and to divest the cable facilities. (A 123-25.) Thus, NITCO was ordered to divest a cable business it did not own or control.

The FCC directed the Bureau to oversee settlement negotiations on Comark's damages claim. (A 123, 126.) That order led to direct negotiations between petitioners and Bureau officials that continued on an adversarial basis for nearly three years. During that time, the Bureau negotiated matters pending before the FCC, and represented the FCC's interests in litigation in which the agency was an adverse party. (A 50-53, 70-71; JA 1567, 1595, 1642, 1653, 1719-23.) At the same time, those Bureau officials also performed investigative (JA 1528, 1635) and decision-making functions in this case. (JA 1712, 1766, 1802, 1871.)

---

[10] The reasoning the FCC employed to find prohibited relationships between the two corporations was circuitous. The agency pierced the corporate veils of NITCO and Cablevision, but found no common ownership or control. It did find, however, that Robert Mussman had personally assisted his son in starting Cablevision. The agency then imputed Mr. Mussman's personal conduct back to his corporation. By so doing, the FCC disregarded its "time-honored presumption against attribution of family interests," *see Llerandi v. FCC*, 863 F.2d 79, 86 (D.C. Cir. 1988), and the Mussman family's "technical compliance" with the rules, *see Alabama Radio Corp.*, 69 F.C.C.2d 1256, 1262 (1978).

The FCC's decision below stands alone against a long line of precedent holding that close family relationships do not create the presumption of corporate affiliation in the absence of evidence of common ownership or control. *See, e.g., Virginia Communications, Inc.*, 2 FCC Rcd 1895, 1897-98 (1987). In such cases, the FCC has not questioned a parent's motives in assisting a child in starting a communications business. *See id.* at 1898.

NITCO and Cablevision timely sought reconsideration of the FCC's decision on the grounds that many of the FCC's findings were erroneous (JA 1469-75); that NITCO was statutorily exempt from the certification requirements of Section 214(a) (JA 1549-54); that, under *Chesapeake & Potomac Tel. Co.*, 57 Rad. Reg. 2d (P&F) 1003, 1008 (1985), no finding of an "affiliation" could be made in absence of evidence of "common control over the two companies" (JA 1537-41); and that the cross-ownership rules were so broad as to run afoul of the overbreadth and vagueness doctrines. (JA 1554-55.)

The FCC denied reconsideration August 23, 1985. (A 78.) Although it cited the Cable Act [11], the FCC held that it was "not necessary to find that there was common control over [NITCO and Cablevision] to find that they were and continue to be affiliated companies." (A 89.)

Even after petitioners sought review in the D.C. Circuit, the FCC continued to entertain argument in this case. In seeking a stay pendente lite from the agency, petitioners argued that they were in compliance with the Cable Act, because Cablevision had "not been shown to be owned by, operated by, controlled by or under common control with NITCO." (JA 1839-40.)

By an order issued after the case had been presented to the D.C. Circuit, the FCC conditionally stayed its divestiture order. (A 48.) The FCC noted for the third time, but did not apply, the "intervening action of Congress in the Cable Act." (A 68.)[12]

C. The *NITCO I* Remand

On appeal to the D.C. Circuit, petitioners argued that the FCC lacked Section 214 jurisdiction; that the FCC's

---

[11] The FCC claimed it had jurisdiction over the matter under Section 613(b) of the Cable Act. (A 92-93.)

[12] The FCC noted that its cross-ownership rules were codified "for the most part" by the adoption of the Cable Act. (A 56.) The FCC noted further that it "consciously chose to retain the current attribution rules", because it found "nothing in the Cable Act or its legislative history to indicate that Congress believed any change in this respect would be desirable." (A 56.)

definition of "affiliate" conflicted with the Cable Act definition; and that the FCC's rules suffered from overbreadth. However, the focus of the case changed after this Court decided *City of Los Angeles v. Preferred Communications.*

This Court held in *Preferred*, for the first time, that government regulations imposing "exclusivity in cable franchising" were subject to challenge under the First Amendment. *See* 476 U.S. at 497 (Blackmun, J., concurring). *Preferred* suggested that the FCC's cross-ownership rules could be challenged as an unconstitutional restraint on the number of cable operators who could exercise free speech rights. Accordingly, in a supplemental brief filed with the D.C. Circuit, petitioners presented the first challenge to the cross-ownership rules under the First Amendment.

The D.C. Circuit declined to reach the Cable Act and First Amendment arguments on exhaustion grounds (A 42), and it reserved judgment on the jurisdictional issue. (A 42-3.) However, the Court decided that the FCC's finding of "affiliation" appeared to conflict with the agency's own rules and its precedent allowing Bell Operating Companies to construct and maintain cable facilities. (A 40-1.) Accordingly, the D.C. Circuit remanded the case generally "for proceedings consistent with [its] opinion." (A 43.)

D. The Post-Remand Proceedings

Shortly after the *NITCO I* remand, the FCC launched a formal inquiry to determine whether the cross-ownership restrictions were still "necessary or desirable".[13] Buoyed by the FCC's transparent disenchantment with cross-ownership restrictions, petitioners moved the FCC to terminate its enforcement proceeding against them. (JA 1902.)

Petitioners relied on governing law that was handed down after the administrative record closed to squarely

---

[13] *See Telephone Company/Cable Television Cross-Ownership Rules (Notice of Inquiry)*, 2 FCC Rcd 5092, 5093 (1987).

present First Amendment and Cable Act defenses to the FCC's enforcement action. (JA 1936-96.) They expressly requested that the FCC reassess the existing record in light of the Cable Act, this Court's decision in *Preferred*, the emphatic holding of *Meredith Corp. v. FCC*, 809 F.2d 863, 872-74 (D.C. Cir. 1987), that the FCC must consider First Amendment defenses, and the decision in *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1565-70 (D.C. Cir. 1987), that the FCC must apply Cable Act definitions.

Petitioners subsequently presented the FCC with yet another opportunity to pass on their First Amendment and Cable Act claims by filing comments in the FCC's parallel cross-ownership inquiry. In their comments, petitioners formally requested a summary rulemaking proceeding to adopt the Cable Act definition of "affiliate". They also complained that the FCC was enforcing a constitutionally suspect rule against them at the same time the agency itself formally questioned whether that rule served a useful purpose.[14]

Acting as a decision-maker, the Bureau refused to initiate a summary rulemaking to conform the rules to the Cable Act on the grounds that a separate proceeding would be "duplicative" of the cross-ownership inquiry.[15] In the interim, frustrated by the FCC's refusal to address the First Amendment issue, Rhys Mussman and NITCO brought an action in federal district court to have the Cable Act cross-ownership restrictions, and the FCC's rules, declared unconstitutional. *See Mussman v. FCC*, No. H88-0163 (N.D. Ind. Mar. 24, 1988).

The FCC issued its final decision nearly ten months after the *NITCO I* remand. (A 18.) The agency did not rule that it was precluded from reaching the merits of the constitutional and statutory claims; it simply ignored them. In the footnote to the final line of its decision, the FCC brushed aside those claims by holding:

---

[14] *See* Brief for Petitioners, Addendum II at 5, *NITCO II*.

[15] *See id.*, Addendum II at 19.

> [T]he Court merely remanded the case for the limited purposes discussed herein. We find that defendants' attempt to inject new arguments at this late date as well as reargue positions already fully considered before the record was closed would not be in the public interest.[16]

The FCC did not address the First Amendment and Cable Act issues in its parallel cross-ownership inquiry until after petitioners had taken this case back to the D.C. Circuit. The FCC then issued a decision in that proceeding in which it tentatively concluded that the Cable Act cross-ownership ban should be repealed by Congress. *Further Notice of Inquiry*, 3 FCC Rcd at 5849.

In that collateral proceeding, the FCC admitted that cross-ownership restrictions "may implicate First Amendment rights . . . ." 3 FCC Rcd at 5864. While it proclaimed that the restrictions are "constitutionally sustainable", the agency admitted that "less restrictive alternatives" were apparently available and should be explored. *Id.* Indeed, the FCC admitted that enforcement of the Cable Act restrictions would be "less restrictive" than its own rules. *Id.* at 5865-66. Accordingly, it finally proposed to amend its rules to conform to the Cable Act, as NITCO and Cablevision had requested previously, but it did so grudgingly.[17]

E. The Qualifications Hearing

After the agency had long refused to afford petitioners an evidentiary hearing or a trial de novo on the alleged

---

[16] A 31.

[17] The FCC's analysis was transparently intended to avoid admitting that petitioners had been correct in their claims. The FCC argued that "the Cable Act appears to permit [it] to relax the Note 1 definition . . . ." 3 FCC Rcd at 5865. That argument turns the teaching of *ACLU* on its head. Under *ACLU*, the FCC was *required* to apply the Cable Act definition. *See* 823 F.2d at 1565-70.

cross-ownership violation [18], the Bureau in its decision-making capacity designated Rhys Mussman for a rare evidentiary hearing to determine whether he complied with the divestiture order in this case, and whether he should be disqualified as an applicant in the FCC's cellular radio service. *See Rhys G. Mussman*, 3 FCC Rcd 6808 (Com. Car. Bur. 1988).

The Bureau's hearing designation order constituted a collateral enforcement of the FCC's divestiture order and the underlying cross-ownership rules. Perfectly aware of the facial constitutional challenge then pending in the D.C. Circuit, the Bureau nevertheless enforced the suspect cross-ownership rules against Mr. Mussman without resolving the claim that the rules were void on their face.

Faced with the prospect of more litigation before an agency that had already prejudged the underlying issues, Rhys Mussman notified the FCC on July 7, 1989, that he had divested his cable systems, and that he had entered into settlement agreements under which he would dismiss his pending FCC applications. (A 148.)

F. The Decision Below

Even though the FCC did not address the First Amendment arguments in its final decision, it was prepared to address them before the D.C. Circuit. As grounds to dismiss the facial challenge brought by NITCO and Rhys Mussman in district court, the FCC and the Depart-

---

[18] The FCC ordered NITCO to pay a forfeiture in the amount of $20,000.00. (A 101.) To enforce that forfeiture, the government had to file a civil suit in district court within one year, and prevail in the subsequent trial de novo. *See* 47 U.S.C. §§ 415(f), 504(a). Rather than seeking to enforce the forfeiture, the government only sought summary enforcement of the FCC's divestiture order. *See United States v. Northwestern Ind. Tel. Co., Inc.*, No. H87-0158 (N.D. Ind. Mar. 11, 1987). By that strategy, the government abandoned the forfeiture, but avoided a trial de novo on the alleged cross-ownership violation.

After the *NITCO I* remand, the FCC agreed to a dismissal without prejudice of its enforcement action in federal district court. *See* Brief for Respondents at 17, *NITCO II*.

ment of Justice asserted that the issue of "whether the cross-ownership statute is facially unconstitutional" under the First Amendment was "squarely presented" in this case. (A 153.)

Before the D.C. Circuit, the agency virtually conceded that court could consider the constitutionality of the Cable Act.[19] Moreover, at oral argument, FCC counsel not only admitted that the agency had the opportunity to rule on the First Amendment issue in this case, but he suggested that the court could infer that the agency had considered the constitutionality of its rules. (A 135.) He contended that the FCC was not required to expend its resources "authoring [an] essay" explaining why its rules were constitutional. (A 136.)

The *NITCO II* court apparently concluded that the FCC, which routinely regulates new communications media protected by the First Amendment, need not accord any preferential treatment to serious First Amendment claims. Although the case had been argued predominantly on facial constitutional and statutory issues, the court refused to rule on either the First Amendment challenges or the Cable Act claim. The court declined to consider the merits of those issues by relying on an amalgam of "well-established principles of waiver, exhaustion of remedies and law of the case", none of which the FCC had asserted below. (A 9.) By so doing, the *NITCO II* court ignored the *NITCO I* ruling, constituting the law of this case, that the court "cannot affirm on grounds other than those presented by the [FCC] itself." (A 41.)

Citing *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984), the *NITCO II* court held that petitioners had waived their claims by not presenting them on the first appeal. (A 9-10.) Moreover, and most unfairly, the court suggested that the "failure" to raise the issues in *NITCO I* was the product of "inad-

---

[19] Brief for Respondents at 37-38, *NITCO II*. Obviously, if the Cable Act restrictions were unconstitutional, the FCC's rules, which are purportedly based on the statute, would also fall.

vertence". (A 10.) The *NITCO II* court overlooked the fact that the First Amendment and Cable Act issues were raised in *NITCO I*. (A 42.)

Irrespective of the intervening decisions of the D.C. Circuit in *Meredith* and *ACLU*, the *NITCO II* court apparently found that the FCC was under no duty to explicitly consider a First Amendment defense or to apply a Cable Act definition. The court held that Section 405 of the Act, 47 U.S.C. § 405, which codifies exhaustion principles, requires "compliance with the agency's procedural rules". (A 10-11.) The court characterized the FCC's decision on remand as a refusal to allow petitioners "to secure by virtue of the fortuity of our remand, a second opportunity to comply with Section 405," and stated without elucidation that to do so would "[seriously compromise] the efficiency and fairness values" exhaustion principles serve. (A 11.)

The court held that the Cable Act and "as applied" constitutional claims ran afoul of the law of the case doctrine. (A 12.) The court reasoned that the FCC could not rule on those claims on remand, because they had been raised on the *NITCO I* appeal and rejected on exhaustion grounds. (A 12.)[20] Disregarding the fact that the Cable Act was not enacted until after the administrative record closed, the court also concluded that petitioners lost any claim to Cable Act protection by "their own litigation strategy". (A 13.)[21]

The *NITCO II* court never reached the question of the FCC's jurisdiction over NITCO, even though the *NITCO*

---

[20] The court also stated that the law of the case doctrine should especially apply because petitioners had previously argued to the FCC that the Cable Act did not apply to their case. (A 12.) That was simply not true. (JA 1839-40.)

[21] The court also claimed that "[p]etitioners admit that nothing prevented them from advancing these arguments in the initial proceedings." (A 11.) No such admission was ever made. The court did not consider the fact that those arguments were based entirely on intervening changes in law.

I court had reserved on that issue. The court did rule that NITCO had violated the cross-ownership rules because it had not offered indiscriminately "cable facilities on a common-carrier basis." (A 6.) The court did not address the novel jurisdictional issue of how NITCO, an exempt intrastate carrier, could fall subject to FCC jurisdiction having *never* offered or supplied "cable facilities on a common-carrier basis"—or any other communications service—to Cablevision.

REASONS FOR GRANTING THE WRIT

First Amendment freedoms occupy a preferred position in the constitutional hierarchy. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938). A reviewing court therefore must strictly scrutinize government restrictions on those freedoms. Indeed, when First Amendment values are at stake, the usual presumption of validity of a regulation is reversed. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The D.C. Circuit has evidenced a willingness to apply a particularly strict standard of review to FCC actions that evidence an administrative insensitivity to First Amendment values. *See Meredith*, 809 F.2d at 873-74. In this case, however, the D.C. Circuit took no notice of facts suggesting that the FCC was dodging First Amendment issues in order to prevail in an enforcement action.[22] Rather than applying a level of review commen-

---

[22] The timing of the FCC's actions rendered its decision suspect. *Cf. News America Pub., Inc. v. FCC*, 844 F.2d 800, 807 (D.C. Cir. 1988). Petitioners requested an expedited rulemaking to conform the rules to the Cable Act. That request was denied three weeks before the FCC adopted its final order in this case. Approximately two months later, the FCC instituted the rulemaking that petitioners had requested, and it ruled favorably on their basic premise that the cross-ownership rule was more restrictive than the Cable Act. *See Further Notice of Inquiry*, 3 FCC Rcd at 5865-66. Had the FCC made that ruling here, where First Amendment values were directly implicated, it would have substantially undermined its divestiture order.

The FCC's decision-making process below was also suspect. The FCC not only employed ad hoc procedures to adjudicate this case,

surate with the First Amendment values involved, the court appeared to accord undue deference to the agency, even to the extent of supplying post hoc rationalization for the FCC's refusal to reach the First Amendment issues.

I. The FCC's Cross-Ownership Rules Are Unconstitutional On Their Face

A. The FCC Had To Apply The Cable Act

The D.C. Circuit apparently concluded that the FCC was under no obligation to apply the governing provisions of its enabling statute unless expressly requested to do so. However, the FCC has the statutory duty to "execute and enforce" the provisions of the Act. *See* 47 U.S.C. § 151. Thus, on December 29, 1984, the effective date of the Cable Act, the FCC assumed the duty to enforce the provisions of the new law, including the statutory definition of "affiliate".[23]

The Cable Act supplied a specific definition of "affiliate" for the purposes of the statutory cross-ownership restrictions. *See* 47 U.S.C. § 522(1). As the FCC now admits, the statutory definition is different from, and less restrictive than, the agency's definition;

> [T]he restriction in the Cable Act is not as comprehensive as the current prohibition of Note 1. * * * In other words, the focus of both [47 U.S.C. § 533(B)(1)], and "affiliate" as used in that section, is ownership and/or control by the carrier rather than, as under the current . . . rule, any affiliation whatsoever between the carrier and the cable system, other than the carrier-user relationship.[24]

---

but it took no steps to ensure an adequate separation of functions within the agency. The fact that the Bureau played both a prosecutorial and a judicial role deprived the decision-making process of the appearance of complete impartiality.

[23] Congress incorporated the Cable Act into the Communications Act. *See ACLU*, 823 F.2d at 1558 n. 1.

[24] *Further Notice of Inquiry*, 3 FCC Rcd at 5866.

Any doubt as to whether the FCC had to apply the Cable Act definition of "affiliate" should have been foreclosed by the D.C. Circuit's decision in *ACLU*. There the court held that a Cable Act definition "should apply in all circumstances" if the definition is unambiguous on its face and if its application would not lead to unreasonable results. 823 F.2d at 1567-69. The FCC conceded both prerequisites when it held that the language of the Cable Act definition of "affiliate" is unambiguous, and it tentatively concluded that the adoption of the statutory definition would serve the public interest. *See Further Notice of Inquiry*, 3 FCC Rcd at 5865-66.

B. The FCC's Rule Is More Restrictive Than The Cable Act

Prior First Amendment challenges to cable regulations have required the federal courts to determine the precise level of constitutional protection due cable operators.[25] Whatever standard of First Amendment review is employed, however, it entails an analysis of the substantiality of the governmental interest furthered by the regulation and an assessment of the breadth of the restriction on free speech.[26] Here, this Court need not categorize the nature of the governmental interest served by the FCC's cross-ownership rules.

The Cable Act cross-ownership restrictions and the FCC's cross-ownership rules serve the identical governmental purpose.[27] Congress determined that its defini-

[25] *See Century Communications Corp. v. FCC*, 835 F.2d 292, 297-98 (D.C. Cir. 1987); *see also Quincy Cable TV*, 768 F.2d at 1447-54.

[26] Regardless of whether the "traditional" First Amendment analysis is used, or whether the less-demanding test of *United States v. O'Brien*, 391 U.S. 367 (1968) is employed, a court must determine whether the regulation is narrowly tailored to serve the governmental interest. The difference in the analysis focuses on the government's burden of justification. *See Quincy Cable TV*, 768 F.2d at 1450-51.

[27] In passing the Cable Act, Congress did not independently evaluate or justify the cross-ownership prohibition, but merely

tion of "affiliate" adequately satisfied the government's interest in prohibiting common ownership and control over collocated telephone companies and cable operators. Yet, as the FCC now admits, the restrictions imposed by its cross-ownership rules go beyond the "minimum required by the Cable Act". *See Further Notice of Inquiry*, 3 FCC Rcd at 5866. That overbreadth is fatal to the rules.

The unconstitutional effect of the rules is to *enlarge* the class of speakers banned from cablespeech beyond the class more narrowly tailored by Congress. The statute bans cable operators under common ownership or control with local telephone companies; the FCC's rules reach cable operators with "relationships" with the local telephone companies that fall far short of an ownership or controlling interest. Thus, when viewed in light of the less restrictive alternative *mandated* by the Cable Act, the cross-ownership rules are obviously overinclusive and cannot pass muster under the First Amendment.

The foregoing, rather abbreviated, First Amendment analysis finds support in this Court's reasoning in *Boos v. Barry*, —— U.S. ——, 108 S. Ct. 1157 (1988). There, this Court held that a District of Columbia statute prohibiting the display of critical signs within 500 feet of a foreign embassy was not narrowly tailored to meet its objective and declared it unconstitutional. The best evidence that the statute was overbroad was an alternative, less restrictive law passed by Congress which only prohibited activity undertaken to intimidate, coerce, threaten, or harass a foreign official. *See* 108 S. Ct. at 1165-68. Thus, the Court was able to strike the statute without regard to whether the governmental interest it served was "compelling". *Id.* at 1168.[28]

---

adopted the FCC's cross-ownership rules, except for Note 1. *See Notice of Inquiry*, 2 FCC Rcd at 5092-93.

[28] It is noteworthy that the Court relied on Congress' request that the District of Columbia government repeal the act in question, and the District's contingent repeal of the statute, to show

This Court should ultimately hold that the FCC must regulate in the least restrictive manner when the least restrictive means is mandated by the agency's governing statute.

II. The D.C. Circuit Refused To Consider Fundamental Issues That Were Properly Presented

The D.C. Circuit held that it too would not address the facial challenges to the cross-ownership rules, citing a gestalt of preclusion principals, *i.e.*, law of the case, exhaustion of remedies and waiver. (A 9.) In doing so, the court has created precedent that the failure to exhaust administrative remedies may not be cured even where a case is remanded so that the agency can correct its own errors.

As the *NITCO I* court recognized (A 41), a fundamental tenet of administrative law is that a reviewing federal court may not uphold an agency's order on grounds upon which the agency itself did not rely.[29] Here, the agency never asserted any of the preclusion principles on which the D.C. Circuit subsequently relied; rather, the FCC merely stated its belief that its consideration of the issues raised on remand would not serve the public interest. (A 31.) Although a court may—if it can fairly discern where the agency is heading—uphold the agency even when the basis for the agency decision is not crystal clear, it cannot simply supply the rationale which the agency decision lacks. This is, however, what the D.C. Circuit did.

Even if the court was free below to assert preclusion principles on the agency's behalf, no doctrine of preclu-

---

that the case for sustaining the provision has been severely undercut. 108 S. Ct. at 1167-68. Similarly, the FCC's suggestion that Congress repeal the cross-ownership ban undercuts the constitutionality of such restrictions.

[29] *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935).

sion was applicable in the extraordinary circumstances of this case. Petitioners submit that no principles of waiver, exhaustion of remedies, or law of the case should have precluded consideration of the fundamental issues raised in this case.

A. The Waiver Issue

Absent a *Laffey* waiver,[30] the constitutional arguments, especially the facial claim, were barred only if the court could find they were knowingly waived.[31] For, as the *NITCO II* panel recognized, the *Laffey* rule was of "particular importance" in this case, because facial constitutional arguments "are not generally subject to exhaustion requirements." (A 10.)

Although a litigant may waive a First Amendment defense by failing to raise it at a proper time, such a waiver should be found only in "clear and compelling" circumstances. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967). The "mere failure to interpose [a First Amendment] defense prior to the announcement of a decision that might support it cannot prevent a litigant from later invoking such a ground." *Id.* at 143.

Petitioners interposed their First Amendment defense in the *NITCO I* appeal shortly after this Court's decision in *Preferred* was announced. That decision was

---

[30] The *NITCO II* court erroneously held that petitioners failed to raise their First Amendment and Cable Act claims in the initial appeal. Thus, it decided that the claims were lost under the *Laffey* rule that a "party waives a contention that could have been but was not raised on a prior appeal." 740 F.2d at 1089-90. The *NITCO II* court overlooked the fact that petitioners did raise the issues in the first appeal, but the *NITCO I* court declined to entertain those arguments, because petitioners had not given the FCC an "opportunity to pass" on them. (A 42.) Thus, the *NITCO I* court ruled that petitioners *could not* raise the issues at that stage of the appeal, and the *Laffey* rule was not triggered.

[31] A First Amendment waiver by a cable operator may be inferred only "upon clear and convincing evidence that the waiver [was] knowing, voluntary and intelligent." *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1099 (3d Cir. 1988).

the first to suggest that the FCC's cross-ownership rules were susceptible to challenge as an unconstitutional prior restraint on the exercise of free speech rights.[32]

By finding a waiver, the *NITCO II* court impliedly ruled that petitioners should have known the First Amendment arguments during the "initial proceedings" in 1983-84. *See supra* note 21. If so, the FCC should have also known that it was enforcing a constitutionally suspect rule. Petitioners submit, however, that the state of the law before *Preferred* does not justify finding either a knowing First Amendment waiver or a knowing enforcement of a suspect rule.

This case simply does not present the "clear and compelling" circumstances necessary to find a waiver of the First Amendment defense under *Butts*. Therefore, the D.C. Circuit should have met its duty to decide the constitutional questions necessary to dispose of this litigation. *See Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979).

Moreover, a First Amendment waiver should not be inferred in circumstances where it would work an injustice. *See Butts*, 388 U.S. at 145. Over two years have passed since petitioners raised the First Amendment defense. In the interim, the FCC has successfully enforced its suspect rule in two cases against the Mussman family, having never addressed the rule's unconstitutional overbreadth.[33] What is most disturbing is that

---

[32] Prior to *Preferred*, First Amendment jurisprudence in the cable arena had focused primarily on the rights of *operating* cable companies to be free of governmental interference. *See, e.g., Quincy Cable TV*, 768 F.2d 1434 (holding FCC "must-carry" rules unconstitutional). There was little precedent on the First Amendment rights of *potential* cable operators. As late as April 1985, there was a "lack of direct precedent" on the issue of allowing access to cable facilities for the purpose of exercising First Amendment rights. *Tele-Communications of Key West*, 757 F.2d at 1337.

[33] The fact that Rhys Mussman was finally coerced into divesting his cable systems does not moot the First Amendment issue here. As demonstrated by the ruling of the FCC's Administrative Law

the court below avoided the First Amendment issue, while relying on the rule's overbreadth to uphold the FCC.[34]

B. The Exhaustion Doctrine

The *NITCO I* court erred in holding that it could not entertain the facial constitutional claim on exhaustion grounds. As the *NITCO II* court correctly noted, facial constitutional challenges are not subject generally to the exhaustion doctrine. (A 10.) Moreover, this Court has held that the exhaustion doctrine is not to be applied inflexibly or arbitrarily, but must be applied with consideration of the purpose of the requirement, the nature of the issues involved and the nature of the parties.[35] Where purely legal issues are in controversy, this Court and other courts have not been reluctant to dispense with the exhaustion requirement as long as so doing would not do violence to the particular statutory scheme in question.[36] Moreover, where an agency seriously

---

Judge terminating the inquiry into his qualifications, Mr. Mussman must raise the matter of his noncompliance with the divesture order here "in all other proceedings in which he is a party." (A 147.) Clearly, the FCC's decision below will continue to have legal and practical consequences to NITCO, Cablevision and Mr. Mussman. *See American Tel. & Tel. Co. v. FCC*, 551 F.2d 1287, 1290 (D.C. Cir. 1977). Thus, in light of this Court's "collateral consequences doctrine," this case is not moot. *See, e.g., Carafas v. La Vallee*, 391 U.S. 234, 237-38 (1968).

[34] The court concluded that "petitioners have, in light of the regulations' broad sweep, failed to demonstrate that any of the indicia relied upon by the FCC for its finding of affiliation was improper". (A 8.)

[35] *See McKart v. United States*, 395 U.S. 185 (1969). *See also Action for Childrens Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977); *Great Falls Community TV Cable Co. v. FCC*, 416 F.2d 238 (9th Cir. 1969); *New York State Broadcasters Assoc. v. United States*, 414 F.2d 990, 994 (2d Cir. 1969).

[36] *See McKart v. United States*, 395 U.S. 185; *Allen v. State Bd. of Elections*, 393 U.S. 544, 554 (1969) (interests of judicial economy, and undisputed facts, permit consideration of statute not considered below); *Lilly v. Grand Trunk W.R. Co.*, 317 U.S. 481, 488-89 (1943) (federal safety commission rule considered for first

threatens First Amendment rights, the exhaustion requirement must yield to the policy protecting those rights.[37]

If exhaustion applied at all, it certainly did not "require compliance with the agency's procedural rules" as the court ruled below. (A 11.) The exhaustion principles codified in Section 405 of the Act require only that the FCC be afforded a "fair opportunity" to pass on an issue.[38] FCC counsel conceded at oral argument that the agency had the opportunity to pass on the First Amendment issues. (A 135-36.)

The facts show more than adequate compliance with exhaustion. The FCC not only had the opportunity, but

---

time on appeal); *Hormel v. Helvering*, 312 U.S. 552 (1941) (to comply with fundamental justice, question of law considered for first time on appeal); *National Advertising Co. v. Rolling Meadows*, 789 F.2d 571, 574-75 (7th Cir. 1986) (new statutory argument considered to avoid constitutional argument); *Complaint of Bankers Trust Co.*, 752 F.2d 874, 886-87 (3d Cir. 1984) (to prevent a miscarriage of justice, will consider a theory not presented to the trial court); *Alaska Chapter, Assoc. Gen. Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1165 (9th Cir. 1982) (argument that HUD regulation not authorized by Indian Self-Determination Act, a question of law, considered for first time on appeal); *Empire Life Ins. Co. of America v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972) (duty to apply correct law); *Green v. Brown*, 398 F.2d 1006, 1009 (2d Cir. 1968) (important issue of statutory construction was significant to protecting thousands of investors); *Smith v. Pasqualetto*, 246 F.2d 765, 767-68 (1st Cir. 1957) (lack of omniscience of trial judge and counsel's laxness below warrant consideration of statute, where no injustice would be suffered).

[37] *See National Student Assoc. v. Hershey*, 412 F.2d 1103, 1107-9 (D.C. Cir. 1969); *Wolff v. Selective Service Local Bd.*, 372 F.2d 817, 825 (2d Cir. 1967); B. Schwartz, *Administrative Law* § 8.31, at 506 (2d ed. 1984).

[38] *City of Brookings Mun. Tel. Co.*, 822 F.2d 1153, 1163 (D.C. Cir. 1987). There is no requirement that this opportunity be afforded in "any particular manner." *Office of Communication of United Church of Christ v. FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972). Exhaustion does not require that "formal requirements" be met; substantial compliance is all that is required. *See Joseph v. FCC*, 404 F.2d 207, 210 & n. 11 (D.C. Cir. 1968).

the obligation under *Meredith* and *ACLU* to consider the unconstitutional overbreadth of its rule. Its counsel admitted that the FCC's final decision implicitly included a constitutional determination. On that alone, the *NITCO II* court should have found that the FCC had passed on the issue. However, when those facts are coupled with the FCC's failure to assert the exhaustion doctrine in defense of its decision, the D.C. Circuit should have held that the agency waived whatever claims it had under the doctrine.[39] Such a waiver was found in *Meredith* on facts indistinguishable from those of this case.[40]

Finally, the D.C. Circuit applied the wrong test when it balanced the alleged "failure" of petitioners to raise the issues against the FCC's "unexceptionable" conclusion that consideration of the claims was not "required" by the *NITCO I* remand and would not serve the public interest. (A 11.) The court should have balanced the burden imposed on Cablevision if it was denied judicial review of its First Amendment claims against the purposes of the exhaustion doctrine.[41] The doctrine could

---

[39] *See Weinberger v. Salfi*, 422 U.S. 749, 765-67 (1976); 2 C. Koch, *Administrative Law and Practice* § 10.24, at 184-86 (1985).

[40] The court implied that the constitutional defense in *Meredith* was "properly presented" under the FCC's procedural rules, while the defense was not properly presented below. (A 12.) However, the FCC did not rule that the First Amendment defense was barred by its procedural rules, and petitioners know of no such rule that would prohibit the presentation of such a defense after a court remand. Indeed, the FCC routinely entertains new arguments in post-remand cases. *See Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95, 98-103 (D.C. Cir. 1985).

Moreover, as in this case, the First Amendment claim in *Meredith* was late-filed. *See* 809 F.2d at 869-70. However, as was the case here, the FCC declined to bar the claim on procedural grounds, but refused consideration on substantive grounds. *See id.* at 869. On those facts, the court found that exhaustion had been waived and it was free to rule on the First Amendment claim. *See id.* at 870 (the FCC's discussion of the claim, "albeit cursory", demonstrated that it had the opportunity to pass on the issue.)

[41] *See Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

have been applied here only if the court concluded that the purposes of the exhaustion rule "clearly outweighed" the suppression of Cablevision's free speech rights. *See McKart*, 395 U.S. at 197.

C. The Law Of The Case Doctrine

The doctrine of law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). However, this Court has recognized that the doctrine is an "amphorus concept" which was "understandably crafted with the course of ordinary litigation in mind." *See id.*, 460 U.S. at 618-619. This, however, is no ordinary litigation.

The enactment of the Cable Act *after* the record closed below precluded perfect procedural regularity, and transformed this case into an extraordinary agency proceeding. However, even if petitioners were arguably tardy in addressing the new law, *NITCO I* did not give rise to law of the case that could foreclose consideration of the post-Cable Act constitutionality of the rules.[42]

The law of the case doctrine "comes into play only with respect to issues previously determined." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979). "Questions that

---

[42] The D.C. Circuit apparently overlooked the fact that the governing law changed dramatically after the administrative record closed. Not only was the Cable Act passed, but *Preferred*, *Meredith* and *ACLU* were decided after the *NITCO I* appeal was filed. Clearly, the law of the case doctrine must yield to intervening changes in controlling law. *See Doe v. Anrig*, 728 F.2d 30, 31 (1st Cir. 1984); *Amen v. City of Dearborn*, 718 F.2d 789, 793-99 (6th Cir.), *cert. denied*, 465 U.S. 1101 (1983); *see generally*, Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 Utah L. Rev. 1. Important issues should be reached on their merits regardless of whether they were ineffectively presented in a first appeal. *See Dick Warner Cargo Handling v. Aetna Business Credit*, 746 F.2d 126, 135 (2d Cir. 1984). Here, the effective presentation of the claims was hampered, if not precluded, because the governing law was handed down after the case was submitted to the FCC.

merely *could* have been decided do not become law of the case". *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 806 (D.C. Cir. 1984) (emphasis original); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 at 788-89 (1981). In particular, the doctrine "does not encompass issues presented for decision but left unanswered by the appellate court." *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983).

The *NITCO I* court could have decided whether the FCC's rules violated the First Amendment and/or were inconsistent with the Cable Act. However, it chose not to "entertain" those issues. (A 42.) Having provided no decision on the merits of those claims, *NITCO I* could not serve as a basis for a finding that law of the case prevented those claims from being decided in *NITCO II*.[43]

The fact that the *NITCO I* court generally remanded "for proceedings consistent with [its] opinion" (A 43) does not suggest that the agency was limited to addressing the issues the court entertained. Such general language indicates that the panel did not intend to "tie" the FCC's hands "to a bedpost forcing it to stare only at the issues specifically decided."[44] That view is reinforced by

---

[43] *See Pegues*, 706 F.2d at 738. Conversely, the *NITCO I* court could have unambiguously ruled that the First Amendment and Cable Act protections had been waived. Yet, the *NITCO I* opinion, specifically note 8, does not indicate that the court determined that those claims had been lost, or that it intended to put those matters to rest in this case. The *NITCO I* opinion was authored by Judge Silberman, who had recently authored *Meredith*. Clearly, if Judge Silberman intended to relieve the FCC of its duties under *Meredith*, he could have explicitly said so. Yet, in note 8, Judge Silberman cited to *Meredith* only as authority that exhaustion requirements apply even to constitutional challenges to agency rules. (A 42.) *NITCO I* did not hold, expressly or by implication, that the First Amendment defense was foreclosed on remand.

[44] *Chapman v. National Aeronautics & Space Adm.*, 736 F.2d 238, 242 (5th Cir.), *cert. denied*, 469 U.S. 1038 (1984).

the FCC's well-documented practice of considering "new" issues on remand.[45]

A leading authority on preclusion principles has urged that the law of the case doctrine should never be employed to avoid the merits of a constitutional question or to deprive a litigant of a fundamental constitutional right. Vestal, *supra* note 42, at 29. If the doctrine can be so employed, it should only apply where there was a clear prior judicial statement that the constitutional claim was considered and rejected.[46] *NITCO I* states only that the constitutional claim was not considered, which could hardly give rise to law of the case sufficient to bypass important First Amendment issues.

III. The Court Neglected To Rule On The Jurisdictional Issue

The *NITCO I* court reserved on the "novel question" of whether NITCO was required to obtain a certificate from the FCC under Section 214 of the Act before it acted as a contractor to construct cable systems in which it would have no ownership or controlling interest. (A 42-43.) The *NITCO II* court, however, did not rule on that question, or on the underlying jurisdictional issue.

The FCC purported to base its jurisdiction over the alleged "affiliation" between NITCO and Cablevision on Section 214, which requires any "carrier" to obtain certification before constructing any line for interstate communications. (A 120-21.) Prior to this case, however, it was settled only that cable "channel service" furnished by carriers constituted common carriage; and that Section 214 applied only to the construction of "channel distribution systems" by carriers to provide "channel service" to cable operators.[47] NITCO is not a "carrier"

---

[45] See *Eastern Carolinas*, 762 F.2d at 98-103 and the FCC cases cited therein.

[46] *See United States v. Curtis*, 683 F.2d 769, 772 (3d Cir.), *cert. denied*, 459 U.S. 1018 (1982).

[47] *See General Tel. Co. v. FCC*, 413 F.2d 390, 395 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

subject to the FCC's jurisdiction; and it never constructed facilities to provide "channel service" or any other communications services to Cablevision.[48] Having never offered cable facilities *at all*, NITCO should not have been indicted for failing "to offer cable facilities on a common-carrier basis." (A 6.)

Section 214 by its own terms applies only to a "carrier" otherwise subject to FCC jurisdiction. NITCO, however, is exempt from that jurisdiction under the express wording of Section 2(b)(2) of the Act, 47 U.S.C. § 152(b), because it does not provide interstate communications service. The FCC has never disputed that NITCO falls within Section 2(b)(2); it thus had no power to require NITCO to obtain a Section 214 certificate. *See Louisiana Public Service*, 476 U.S. at 374.

NITCO was not involved in common carriage or "channel service" when it installed Cablevision's equipment. The essential element of common carriage is to provide "a service whereby customers may 'transmit intelligence of their own design and choosing'."[49] NITCO never provided any service over the facilities it installed. It only provided construction services and rented pole attachment space to Cablevision. The FCC has held that such services are not communications services subject to its jurisdiction. *See California Water*, 64 F.C.C.2d at 758-60.

The FCC held that NITCO forfeited its Section 2(b)(2) exemption by constructing facilities for an "affiliate". (A 63.) But "affiliation" for purposes of

---

[48] "Channel service", as defined by the FCC, "simply involves a telephone company's transmission of a cable television system's signals to the cable system's subscribers over lines that the telephone company *owns and operates*." Brief for Respondents at 3 n. 2, *NITCO I* (emphasis added).

[49] *Computer and Communications Ind. Assoc. v. FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982); *National Assoc. of Reg. Utility Comm'rs v. FCC*, 525 F.2d 630, 640 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

cross-ownership does not constitute ownership or control of interstate lines placing a carrier outside of Section 2(b)(2).[50] Even if an "affiliation" could be a basis for jurisdiction, the FCC's power would be limited under its rule to an "affiliate" or an "entity" which is "owned by, operated by, controlled by, or under common control" with the local telephone company. *See* 47 C.F.R. §§ 63.54(a), (b). No such "affiliation" was found here.

By not ruling on this issue, the D.C. Circuit has allowed the FCC to use the overbreadth of its rule to override an express statutory jurisdictional limitation. Congress adopted its own definition of "affiliate" but the FCC has ignored that jurisdictional term to expand its own power contrary to the teaching of *ACLU*. *See* 823 F.2d at 1567 n.32; *see also Louisiana PSC*, 476 U.S. at 374.

CONCLUSION

For the reason stated above, a writ of certiorari should be granted.

Respectfully submitted,

LUKAS, MCGOWAN, NACE & GUTIERREZ, CHARTERED
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006
(202) 857-3500

RUSSELL D. LUKAS
Counsel of Record
GEORGE L. LYON, JR.
KIRBY H. PORTER
LEE BURDICK
Counsel for Petitioners

---

[50] NITCO could lose its Section 2(b)(2) exemption by engaging in interstate communications either by owning or operating a line that crosses a state boundary; or by providing interstate service through physical connection with an affiliated carrier. *See Section 2(b)(2) Ruling*, 2 FCC Rcd 1750, 1753 (1987). NITCO does not own or operate such a line; and its facilities are not interconnected with those of Cablevision.